Supreme Court, U. S.
FILED
DEC 10 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-381

PAUL J. WENGLER,
Appellant,

vs.

DRUGGISTS MUTUAL INSURANCE COMPANY, AND
DICUS PRESCRIPTION DRUGS, INC.,
Appellees.

On Appeal from the Supreme Court of Missouri

APPELLANT'S BRIEF

JOHN W. REID, II
SCHNAPP, GRAHAM & REID
135 East Main Street
Fredericktown, Missouri 63645
314-783-7212
Attorney for Appellant

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statute Involved	3
Constitutional Provision	3
Question Presented	4
Statement of the Case	4
Argument	7
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Arp v. Workers' Comp. Appeals Bd., 19 Cal. 3d 395, 563 P. 2d 849 (1977)	6,9,11
Califano v. Goldfarb, 430 U.S. 199 (1977)	5,6,8,9,13
Califano v. Webster, 97 S.Ct. 1192 (1977)	11
Califano v. Wescott, 99 S.Ct. 2655 (1979)	7,9,14
Craig v. Boren, 97 S.Ct. 451 (1976)	8
Duren v. Missouri, 99 S.Ct. 664 (1979)	3,9
Frontiero v. Richardson, 411 U.S. 677 (1973)	8,9,13
Kahn v. Shevin, 94 S.Ct. 1734 (1974)	11
Orr v. Orr, 99 S.Ct. 1102 (1979)	3,8,13,15

Passante v. Walden Printing Co., 53 App. Div. 2d 8, 385 N.Y.S. 2d 178 (1976) 6,9,11

Reed v. Reed, 92 S.Ct. 251 (1971) 8,13

Stanton v. Stanton, 421 U.S. 7 (1975) 3

Tomarchio v. Town of Greenwich, 75 N.J. 62, 379 A. 2d 848 (1977) 6,9

Weinberger v. Salti, 95 S.Ct. 2457 (1975) 11

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) .. 5,6,8,9,13,14

Wengler v. Druggists Mut. Ins. Co., 583 S.W. 2d 162 (Mo., 1979) 1,2,5,11,12,14

Constitution:

Article 14, Section 1 of U.S. Constitution 2,3,4,10,14,15

Statutes:

28 U.S.C. Section 1257(2) 2

1976 Missouri Revised Statutes Section 287.240 2,3,4,5,7

Other Authority:

52 Tulane L. R. 451 (1978) 11

46 U. Cincin. L. Rev. 572 (1977) 10

9 U. Mich. J. L. Ref. 138 (1975) 9

1 Wash. U. L. Q. 161 (1979) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-381

PAUL J. WENGLER,
Appellant,

vs.

DRUGGISTS MUTUAL INSURANCE COMPANY, AND
DICUS PRESCRIPTION DRUGS, INC.,
Appellees.

On Appeal from the Supreme Court of Missouri

APPELLANT'S BRIEF

OPINIONS BELOW

The opinion of the Missouri Supreme Court entered June 27, 1979, motion for rehearing overruled July 17, 1979, and the opinion of the Circuit Court of Madison County, Missouri, are set out in the Appendix (Jurisdictional A1 through A19). The decision of the Missouri Supreme Court is reported as *Wengler* v. *Druggists Mut. Ins. Co.,* 583 S.W. 2d 162 (Mo., 1979).

JURISDICTION

This action for workers' compensation death benefits draws in question the validity of 1976 Revised Statutes of Missouri Section 287.240 on the ground that the gender line the statute invokes is repugnant to the equal protection clause of the fourteenth amendment to the Constitution of the United States. The statute denies benefits to a widower absent mental or physical incapacity or proof of his actual dependency upon his wife's wages for his support; it accords full benefits to a widow by conclusively presuming her to be totally dependent upon her husband's wages for her support.

The federal constitutional question was timely raised by Appellant before the case was submitted to the Administrative Law Judge (Workmen's Compensation TR 7) and has continuously been raised on appeal (*Wengler,* supra). On October 13, 1977, the Circuit Court of Madison County, Missouri, held for Appellant Wengler, ruling that the equal protection clauses of the Missouri and Federal Constitutions required death benefits for a man whose wife dies in a work-related accident on the same terms as Missouri provides for a woman whose husband dies in a work-related accident (Cir. Ct. TR 2-9). On June 27, 1979, the Missouri Supreme Court reversed; the majority declared the gender classification valid and not repugnant to the Federal Constitution. The dissenting opinion of Justice Seiler states the majority failed to follow the recent U.S. Supreme court cases deciding gender-based discrimination (*Wengler,* supra).

A timely motion for rehearing, filed by Appellant Wengler on July 6, 1979, was overruled by the Missouri Supreme Court on July 17, 1979. Notice of appeal to this Court was timely filed on July 19, 1979 (Juris. Stat. App., pp. 20, 26, 27).

The jurisdiction of the U.S. Supreme Court to review this decision of the Supreme Court of Missouri on appeal is conferred by 28 U.S.C. Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Stanton* v. *Stanton,* 421 U.S. 7 (1975); *Duren* v. *Missouri,* 99 S.Ct. 664 (1979); *Orr* v. *Orr,* 99 S.Ct. 1102 (1979). Probable jurisdiction was noted by the Supreme Court of the United States on October 29, 1979.

STATUTE INVOLVED

1976 Revised Statutes of Missouri Section 287.240 is set out in full in the Jurisdictional Appendix at pages 28 through 31. In relevant part, the statute provides:

. . .

> (2) The employer shall . . . pay to the . . . dependents of the employee a death benefit . . .
>
> (4) The word "dependent" as used in this chapter shall be construed to mean a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, upon his wages at the time of the injury. The following persons shall be conclusively presumed to be totally dependent for support upon a deceased employee and any death benefit shall be payable to them to the exclusion of other total dependents;
>
> > (a) A wife upon a husband legally liable for her support, and a husband mentally or physically incapacitated from wage earning upon a wife; . . .

CONSTITUTIONAL PROVISION

Article 14, Section One of the U. S. Constitution, reads as follows:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they

reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

Whether 1976 Revised Statutes of Missouri Section 287.240, which authorizes workers' compensation death benefits for the spouse of a male worker without regard to dependency, but conditions benefits for the spouse of a female worker upon mental or physical incapacity or proof of dependency, discriminates impermissibly on the basis of gender in violation of the equal protection clause of the fourteenth amendment to the United States Constitution.

STATEMENT OF THE CASE

Ruth Wengler, wife of Appellant Paul J. Wengler, was killed in an accident while working for Appellee, Dicus Prescription Drugs, Inc. (Div. Workmen's Comp. Tr. 2, 3). Appellant Paul J. Wengler made a claim for Workers' Compensation Death Benefits under 1976 Revised Statutes of Missouri Section 287.240 (Div. Workmen's Com. TR 1 and 2). Prior to the July 21, 1977, hearing before the referee, widower Paul J. Wengler filed a memorandum of law setting forth that Section 287.240 violated the equal protection clause of the Federal Constitution; at the hearing, the referee noted that the constitutionality of Section 287.240 was at issue (Div. Workmen's Com. Tr 8).

Under the Missouri law in question, a widower may not obtain periodic workers' compensation death benefits unless he (1) is mentally or physically incapacitated from wage earning; or (2) proves actual dependency upon his wife's wages. By contrast, the Missouri law conclusively presumes a widow totally dependent upon her husband's wages; she qualifies for periodic workers' compensation death benefits without regard to actual dependency. It was stipulated that Appellant Paul J. Wengler was not actually dependent for support in whole or in part upon the wages of his wife at the time of her death nor was he mentally or physically impaired from wage earning (Div. Workmen's Com. TR 3).

On August 4, 1977, the referee denied benefits to Appellant Wengler on the sole ground that he did not meet the sex-specific statutory requirement of incapacity or dependency (See Award on Hearing). On review, the Missouri Labor and Industrial Relations Commission, September 9, 1977, adopted the referee's award and denied compensation (See Award of Labor and Industrial Commission). On October 13, 1977, the Circuit Court of Madison County, Missouri, reversed. The Circuit Court of Madison County, Missouri, held Section 287.240 denied Paul J. Wengler the equal protection of the laws in violation of the Missouri and Federal Constitutions because the statute conclusively presumes the total dependency of a widow upon a husband who dies in a work-related accident, but denies that same presumption to a widower whose wife dies in a work-related accident (Cir. Ct. TR 2 through 9).

On June 27, 1979, the Missouri Supreme Court reversed the judgment of the Circuit Court of Madison County, Missouri. In a 5-1 decision, the Missouri Supreme Court upheld the gender line drawn by Section 287.240, mandating dissimilar treatment of workers and their spouses, solely on the basis of sex. *Wengler,* supra.

The Missouri Supreme Court majority in *Wengler,* supra, acknowledged this Court's condemnation in *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975), and *Califano* v. *Goldfarb,* 430 U.S. 199 (1977), of legislation based on "archaic and overbroad generalizations," statutes "casting female wage earners in a light which denigrates their economic contributions to their

families' support." It also acknowledged the inconsistency of its decision with those of the three state courts that have recently applied *Wiesenfeld* and *Goldfarb* to invalidate proof-of-dependency requirements imposed on widowers, but not widows, under workers' compensation statutes. *Tomarchio* v. *Township of Greenwich,* 75 N.J. 62, 379 A.2d 848 (1977); *Arp* v. *Workers' Comp. Appeals Bd.,* 19 Cal. 3d 395, 563 P. 2d 849 (1977); *Passante* v. *Walden Printing Co.,* 53 App. Div. 2d 8, 385 N.Y.S. 2d 178 (1976). But it disposed of the judgments of this Court and others as "(i)n most instances" arriving at "self-serving conclusions."

ARGUMENT

It is not disputed had Appellant (Mr. Wengler) been employed by Dicus Prescription Drugs, Inc. and died as a result of a work-related accident, his widow would have automatically received the death benefits provided for under the Missouri Workmen's Compensation statutes, 1976 R.S.Mo. §287.240 without any proof of being dependent upon him or proving any mental or physical handicap.

However, since the Appellant's gender in this case is male, the Missouri Workmen's Compensation benefits under 1976 R.S.Mo. §287.240 are denied unless there is proof that Appellant-widower was dependent upon his deceased wife or he is mentally or physically incapacitated.

Although this has been the law in the State of Missouri since 1925 (Jur.App. p. 3), it fundamentally is not fair and flies in the face of the equal protection clause of the United States Constitution.

On June 25, 1979, the U.S. Supreme Court in *Califano* v. *Wescott,* 99 S.Ct. 2655 (1979), unanimously declared unconstitutional a gender line drawn in the context of public assistance unemployed parent benefits. The Court held that explicit sex classification statutes must fall which reflect the "baggage of sexual stereotypes" which presume that men have "primary responsibility to provide a home and its essentials", and women are the "center of the home and family life." *Califano* v. *Wescott,* 99 S.Ct. 2655 at 2663 (1979).

The aforesaid language the Court used in the *Wescott* case was not a new view or theory because the plurality used similar language in other cases prior to the *Wescott* case, supra. For example, see:

(1) *Orr* v. *Orr,* 99 S.Ct. 1102, at page 1112 (1979) declaring State statute providing alimony only to wife and not to husbands as violating the equal protection clause.

(2) *Califano* v. *Goldfarb,* 97 S.Ct. 1021 at 1029 (1977) declaring requirement of social security benefits as violating equal protection clause where widow automatically received benefits but widower had to prove 50% dependency on deceased wife's wages before he was entitled to benefits.

(3) *Craig* v. *Boren,* 97 S.Ct. 451, 457 (1976) declaring liquor law unconstitutional which permitted females to drink at age 18 and males not until age 21.

(4) *Weinberger* v. *Wisenfeld,* 95 S.Ct. 1225 at 1235 (1975) declaring unconstitutional the social security provision allowing benefits for the caretaking of a deceased wage earner's child to its mother but denying benefits to its father.

(5) *Frontiero* v. *Richardson,* 93 S.Ct. 1764 at 1770 and 1771 (1973) declaring Federal statute violating equal protection clause which allowed more fringe benefits to married men in the military than to married women.

(6) *Reed* v. *Reed,* 92 S.Ct. 251 at 254 (1971) declaring State statute unconstitutional that gave men preference over women on administration of estates because it violated equal protection clause of the constitution.

Applying the equal protection principle as elaborated in this Court's 1970s gender classification precedent, three state courts other than Missouri invalidated proof-of-dependency requirements state workers' compensation laws imposed on

widowers but not widows. *Tomarchio* v. *Township of Greenwich,* 75 N.J. 62, 379 A. 2d 843 (1977); *Arp* v. *Workers' Comp. Appeals Bd.,* 19 Cal. 3d 395, 563 P. 2d 849 (1977); *Passante* v. *Walden Printing Co.,* 53 App. Div. 2d 8, 385 N.Y.S. 2d 178 (1976). Only Missouri continues to march to a different tune. Cf. *Duren* v. *Missouri,* 99 S.Ct. 664 (1979). No other jurisdiction, in the wake of *Frontiero* and *Wiesenfeld,* supra, and *Califano* v. *Goldfarb,* 430 U.S. 199 (1977), has aligned itself with the majority below. See Note, 9 U. Mich., J. L. Ref. 138 (1975) (workers' compensation laws in most states extend conclusive presumption of dependency to widower and widow alike).

The Missouri Supreme Court purported to distinguish "the social security cases" *(Wiesenfeld* and *Goldfarb)* on the ground that the benefits to surviving spouses there at issue were "social insurance," "based upon mandatory contributions from past wage earnings of the employee." That distinction, wispy in any event, could hardly be approved on the date of the decision below, June 27, 1979, and surely not on July 17, 1979, when rehearing was denied. Because on June 25, 1979, this Court, in *Califano* v. *Wescott,* supra, unanimously declared unconstitutional a gender line drawn in the context of public assistance unemployed parent benefits. Those benefits were not tied to any "contributions from past wage earnings of the employee."

The California Supreme Court in *Arp,* supra, at page 855, answered the contribution argument as follows:

> "It is true that Mrs. Arp, unlike the deceased wives in *Goldfarb* and *Wiesenfeld,* did not contribute a portion of her earnings to the fund from which her husband is now denied benefits. Section 3751 of the Labor Code prohibits employee contributions. However, the right to compensation insurance coverage arises from 'the relationship of employer and employee itself' (*Noe* v. *Travelers Ins. Co.*

(1959) 172 Cal. App. 2d 731, 733, 342 P. 2d 976, 977; *Shipbuilding etc. Co.* v. *Indus. Acc. Com.*, (1922) 57 Cal. App. 352, 357-358, 207 P. 416), and is, at least in this sense, part of the wage-and-benefits package an employee receives. Thus, under section 3501, subdivision (a), the position held by a working woman with an employed spouse may well generate a smaller sum total of economic benefits than the same job held by a working male with an employed spouse. Since it is estimated that in more than half the families in the United States both husband and wife are wage earners (U.S. Bureau of Census, Statistical Abstract of the U.S., supra, p. 346), the negative potential of section 3501, subdivision (a), is obvious and substantial."

The U.S. Supreme Court has developed three tests to determine whether a statute violates the equal protection clause of the U.S. Constitution.

1. "*Strict Scrutiny Test*" (used where fundamental constitutional rights or classification based on race, alienage, or national origin are involved). It requires proof that the statutory classification is necessary for achievement of some compelling state interest to survive the constitutional attack.

2. "*Rational Basis Test*" (used in cases where fundamental rights or suspect classifications are not in issue). Under this test the legislative classifications are upheld unless they are patently arbitrary, bearing no rational relationship to a legitimate government interest.

3. "*Substantial Relationship Test*" (used in gender classification cases). Under this test the legislation must serve important governmental objectives and must be substantially related to the achievement of those objectives.

For a scholarly discertation of the three tests, see 46 University of Cincinnati Law Review 572 (1977) *Gender-Based Discrimination and a Developing Standard of Equal Protection*

Analysis; 1 Washington University Law Quarterly 161 (1979), *Sexual Equality Under the Fourteenth and Equal Rights Amendments;* 52 Tulane Law Review 451 (1978) *Sex Equality and the Constitution.*

The majority of the Missouri Supreme Court declined to adopt the Strict Scrutiny Test which was used by the New York Supreme Court in *Passante* v. *Walden Printing Co.*, 385 N.Y.S. 2d 178 (1976); and the California Supreme Court in *Arp* v. *Workers' Compensation Appeals Board,* 563 P. 2d 849 (Cal., 1977), see *Wengler* v. *Druggist Mut. Ins. Co.*, 583 S.W. 2d 162, 167 (Mo., 1979) and found that the Missouri gender based distinction on death benefits met the substantial relationship test. *Wengler,* supra, at 164 and 168.

In applying the substantial relationship test, the majority of the Missouri Supreme Court in the *Wengler* case, supra, cited for authority *Califano* v. *Webster,* 97 S.Ct. 1192 (1977) which unanimously held that a provision of the Social Security Law gender based distinction which excluded three more lower earning years for a female than a male in establishing monthly wages did not violate the equal protection clause because Congress deliberately enacted said provision to compensate for particular economic disabilities suffered by women and said provision was not the accidental by-product of a traditional way of thinking about females. The majority also relied on *Kahn* v. *Shevin,* 94 S.Ct. 1734 (1974) wherein the U.S. Supreme Court in a 5 to 4 decision found a $500.00 annual tax exemption to widows but not providing a similar exemption to widowers did not violate the equal protection clause primarily because it involved taxes. And finally, the majority cited as authority *Weinberger* v. *Salti,* 95 S.Ct. 2457 (1975) a 5 to 4 decision holding that Social Security Law did not violate the equal protection clause of the U.S. Constitution by requiring that a widow and a step-child, before being entitled to Social Security benefits of deceased, the widow must have been married to deceased for at least nine months prior to his death.

It is the Appellant's position that Justice Sieler, the sole dissenter in the *Wengler* case, was correct in his opinion citing for authority the following language from the New York and California Supreme Courts at page 170, to-wit:

> ". . . I think the matter is well put in *Passante* v. *Walden Printing Co.,* 53 A.D. 2d 8, 11-12, 385 N.Y.S. 2d 178, 180-81 (1976), as follows:
>
> " '[I]t is clear that the statute before us discriminates against the married woman whose employment contributes to the economic well-being of her family; whereas the working man, as a benefit of employment, is given the security of knowing that in the event of his work-related death, his widow, and therefore in most cases his family, will not suffer the loss of his entire income, the working woman is given no such guarantee. . . .
>
> " '. . . The disadvantage is most apparent in the present case, where Mr. and Mrs. Passante each earned approximately $200 per week. Had Mr. Passante died in a compensable circumstance, his family, through his widow, would have received, in addition to benefits payable on behalf of minor children, at least $156 per month . . . But because Mrs. Passante was the unfortunate victim, the family's resources will be less by the aforementioned amount, simply because the statute arbitrarily classifies the husband as breadwinner and consequently categorizes the wife's work as unimportant.'
>
> "The point is made in *Arp* v. *Workers' Compensation* Appeals Board, 19 Cal. 3d 395, 138 Cal. Rptr., 293, 563 P. 2d 849, 855 (1977) in these words: '. . . On balance, the employed woman is short-changed. While her male colleagues are assured that in the event of a fatal industrial accident their widows—even fully self-supporting widows—will receive a financial cushion, the employed woman can provide her husband with no such security. He will receive benefits only [to] the extent that he can prove dependency, and if he is himself employed he may be eligible for no supplemental death benefit whatever.' "

The U.S. Supreme Court justices have used different tests, but have found that the following gender based distinctions violate the equal protection clause of our Constitution, which involve employment related matters such as administration of estates, employment fringe benefits, social security benefits and welfare benefits, to-wit:

1. *Reed* v. *Reed,* 92 S.Ct. 251 (1971) unanimously holding statute giving gender perference on administration of estates violated equal protection clause.
2. *Frontiero* v. *Richardson,* 935 S.Ct. 1764 (1973) Eight to one decision declaring Federal statute violated equal protection clause which allowed more fringe benefits to married men in the military than to married women.
3. *Weinberger* v. *Wiesenfeld,* 95 S.Ct. 1225 (1975) unanimously held the Social Security provision allowing benefits for the care taking of a deceased wage earner's child to its mother but not to its father violated the equal protection clause.
4. *Califano* v. *Goldfarb,* 97 S.Ct. 1021 (1977) in a 5 to 4 decision declared requirements of Social Security benefits as violating equal protection clause where widows automatically receive benefits but widowers only if they prove they were at least 50% dependent on deceased wife's wages.
5. *Orr* v. *Orr,* 99 S.Ct. 1102 (1979) in 6 to 3 decision held a State's alimony statute violated equal protection clause where husbands could not collect alimony.

6. *Califano* v. *Wescott,* 99 S.Ct. 2655 (1979) unanimously held Federal aid to dependent children statute violated equal protection clause where benefits were payable to family when father was out of work but not when mother was out of work.

From the six immediately preceding U.S. Supreme Court cases, it is clear that a statute which denies to one sex *equal justice under the law* involving employment fringe benefits, social security benefits, welfare benefits, equal right to administer estates, will be found to violate the equal protection clause of our Constitution by our Supreme Court.

Justice Sieler of the Missouri Supreme Court was correct when he stated in *Wengler,* supra, at page 171, the following:

> "Regardless whether the standard to be applied is one of strict scrutiny or substantial relationship, administrative convenience and overbroad characterizations of the male as the primary breadwinner cannot serve to counterbalance or justify a gender-based distinction which diminishes the protection afforded to women who do work. *Weinberger* at 648, 95 S.Ct. at 1233.

The Appellant is confident the Justices will grant him what is carved in the marble over the entrance to the U.S. Supreme Court Building, to-wit: "Equal Justice Under the Law" and find that the Missouri Workmen's Compensation Death Benefits gender based distinction violates the Equal Protection Clause of our Constitution. In so holding, not only Appellant will have won, but all those American families who have been called the silent majority, the working, law-abiding, tax-paying husbands and wives trying to keep ahead of inflation, supporting and educating their children, a group of people without a lobby, organization, committee, trust or foundation to advance their ideas and views will be the real winners. They are made up

of all races, national origins and creeds; they are made up of all types of workers from the bottom rung on the employment ladder to the top executive.

CONCLUSION

Accordingly, the decision of the Missouri Supreme Court should be reversed because the statutory gender-based classification death benefits under the Workmen's Compensation Law violates the Equal Protection clause of the U.S. Constitution and the case should be sent back to the Missouri Supreme Court for a decision on whether the remedy should be to invalidate the provision conclusively granting benefits to widows or to extend the conclusive presumption coverage to include both the widowers and widows under the Missouri Workmen's Compensation Death Benefits. *Orr* v. *Orr,* 99 S.Ct. 1102 (1979).

Respectfully submitted,

John W. Reid, II
SCHNAPP, GRAHAM & REID
135 East Main Street
Fredericktown, MO 63645
314-783-7212

Attorney for Appellant